86-1034

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

MARY SUE TERRY
Attorney General of Virginia

*RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6564
Counsel for Appellant

*Counsel of Record

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

QUESTION PRESENTED

Is the 1985 Amendment to § 18.2-391 of the Code of Virginia making it illegal to knowingly display certain pornographic material where children can examine and peruse it unconstitutional on its face?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia by her Attorney General and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the Council for Periodical Distributors Association, Inc., the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia, and Ampersand Books of Alexandria, Virginia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment and opinion of the United States District Court for the Eastern District of Virginia is reported at 617 F. Supp. 699 and is reproduced in the appellant's Appendix. (App. D at A-15). The initial opinion and judgment of the United States Court of Appeals for the Fourth Circuit dated June 12, 1986, is reported at 792 F.2d 1261, but the court of appeals' corrected modified opinion dated September 30, 1986, has not yet been reported; the court of appeals' opinion, including its modification and correction, is reproduced in the appellant's Appendix. (App. A at A-1).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit held the 1985 amendment to § 18.2-391 of the Code of Virginia repugnant to the United States Constitution in a corrected modified opinion dated September 30, 1986. The court of appeals' jurisdiction was assertedly based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments.

The appellate jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(2), which provides for the direct appeal to this Court from a decision of a federal court holding a state statute to be unconstitutional. To the extent that any question presented herein is found to fall outside this Court's jurisdiction under 28 U.S.C. § 1254(2), the Court's discretion under 28 U.S.C. § 2103 to grant review by writ of certiorari is invoked. *See Maine v. Taylor*, 477 U.S.___, 106 S.Ct. 2440, 91 L.Ed.2d 110, 119 n.4 (1986).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech. . . ." The Fifth and Fourteenth Amendments to the United States Constitution state in pertinent part that, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The relevant federal statutes are 28 U.S.C. §§ 2201 and 2202, commonly called the declaratory judgment statutes, and 42 U.S.C. § 1983. These statutes are reproduced in the appellant's Appendix. (App. J at A-41).

The relevant Virginia statutes are §§ 18.2-390 and 391 of the Code of Virginia. These statutes, with the pertinent 1985 amendment to § 18.2-391 italicized, are reproduced in the appellant's Appendix. (App. K at A-42, 44).

STATEMENT OF THE CASE

Section 18.2-391 of the Code of Virginia has prohibited the sale or loan of certain sexually explicit matter to juveniles for some fifteen years; section 18.2-390 defines the terms used in the article. On July 1, 1985, an amendment enacted by the General Assembly of Virginia, hereinafter "the Amendment," became part of Code § 18.2-391. The Amendment made it unlawful to knowingly display for commercial purposes these long proscribed materials where children can examine and peruse them. (App. K at A-44).

A complaint was filed in the United States District Court for the Eastern District of Virginia, Alexandria Division, on July 16, 1985, by an array of trade associations, bookstores and individuals. Named as defendants were Charles T. Strobel, Director of Public Safety for the City of Alexandria, and William K. Stover, Chief of Police for Arlington County, although neither official had taken any action to enforce the Amendment. The suit was based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments to the United States Constitution. The plaintiffs asked for a declaratory judgment that the Amendment was unconstitutional and sought injunctive relief.

Finding that the complaint called into question the constitutionality of a State statute which affected the public interest, the district court ordered that the Attorney General of Virginia be given the opportunity to intervene in the action on behalf of the Commonwealth of Virginia pursuant to 28 U.S.C. § 2403(b). (App. F at A-34). On July 26, 1985, the Attorney General of Virginia accepted the district court's invitation and intervened in the case. (App. G at A-36).

The district court rendered its judgment and opinion on September 10, 1985, finding that the bookstores and trade associations had standing to sue, that an actual case or controversy existed, and that the Amendment was unconstitutionally overbroad on its face. The court dismissed the complaint as to the individuals who had sued, finding that they did not have standing. The district judge permanently enjoined defendants Strobel and Stover from enforcing the Amendment. (App. D at A-15).

Virginia and defendant Stover filed notices of appeal. Defendant Strobel did not appeal the district court's judgment.

The prevailing plaintiffs thereafter applied for an award of costs and attorney fees under 42 U.S.C. § 1988 in the amount of $17,035.77. The district court concluded that it was equitable to let the costs lie where they fell and denied the plaintiffs' request for fees. (App. E at A-31). The plaintiffs appealed the district court's fee decision to the United States Court of Appeals for the Fourth Circuit.

After briefing and oral argument, a panel of the court of appeals rendered its opinion on June 12, 1986, affirming the district court's judgment that the Amendment was facially overbroad. The district court's refusal to grant attorney fees under § 1988 was, however, reversed. *American Booksellers Ass'n v. Com. of Va.*, 792 F.2d 1261 (4th Cir. 1986). (App. A at A-1).

Defendant Stover, who had argued on appeal that the plaintiffs did not have standing to sue, petitioned for rehearing with a suggestion for rehearing *en banc*. On September 26, 1986, the court of appeals refused Stover's rehearing petition by a vote of six to four with one judge having disqualified himself. (App. B at A-13). Four days later, however, the court issued a modified opinion, which was subsequently corrected, affirming the district court's

fee decision as to the local defendants, but ordering the assessment of fees against the State. (App. A at A-12).[1]

Virginia filed her notice of appeal with the clerk of the court of appeals on October 9, 1986. (App. I at A-39). Upon Virginia's motion, the court of appeals stayed its mandate pending the timely filing of an appeal with this Court. (App. C at A-14).

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

Almost two decades ago this Court found that the First Amendment does not preclude a State from regulating the sale of pornographic material to children which, although not obscene for adults, is "harmful to juveniles." *Ginsberg v. New York*, 390 U.S. 629 (1968). The question presented here is whether the Commonwealth of Virginia can constitutionally prohibit merchants from displaying this *very same* proscribed material where children can examine and peruse it at their leisure. Virginia's interest in regulating such activity is just as compelling as the legitimate state interest in *Ginsberg;* the federal question presented is equally as substantial.

It is now axiomatic that obscene material does not fall within the parameters of constitutionally protected speech. *See Miller v. California*, 413 U.S. 15 (1973). And the doctrine of "variable obscenity" enunciated in *Ginsberg* allows the definition of obscenity to be constitutionally adjusted "to social reality by permitting the appeal of . . . [sexually explicit] material to be assessed in terms of the sexual interest . . . 'of . . . minors.' " *Ginsberg*, 390 U.S. at 638, *quoting Mishkin v. New York*, 383 U.S. 502 (1966); *see also New York v. Ferber*, 458 U.S. 747 (1982).

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[1] The court of appeals' original opinion and its corrected modified opinion are the same except for the last page. The opinion reproduced in the appellant's Appendix is the court's corrected modified opinion containing all changes.

In response to *Ginsberg*, the General Assembly of Virginia enacted §§ 18.2-390 and 391 of the Code of Virginia making it unlawful to knowingly sell or loan to children sexually explicit items that are harmful to them; these statutes were nearly identical to the one validated in *Ginsberg*. The definition of "harmful to juveniles" found in § 18.2-390(6) was subsequently modified to comport with the *Miller v. California* standard. Then, in 1985, § 18.2-391 was amended to also make it unlawful to knowingly display for commercial purposes these same proscribed materials where juveniles could examine and peruse them (App. K at A-44), making Virginia one of at least twenty-eight states and several localities having a law concerning the display or exhibition of pornographic material to juveniles. (App. L at A-46).

Although the Amendment is somewhat different from the *Ginsberg* statute in that it involves the display of pornographic material, not just its sale, this Court has never limited the variable obscenity doctrine to just "sales." Indeed, although Sam Ginsberg had only been prosecuted for the actual sale of restricted material to minors, this Court described the New York statute as one which denied minors "access" to objectionable material, as a regulation of "the availability of sexual material to minors," and as a restraint on minors' "'exposure to such material.'" 390 U.S. at 636, 639; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (society has the right to adopt more stringent controls on communicative materials *available* to youths than on those available to adults); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (adult access to non-obscene, but sexually explicit, material can be limited under some circumstances in order to protect children from its effects).

Despite this Court's recognition that the State's interest in protecting its children from harmful sexually explicit matter is both substantial and constitutional, the Fourth Circuit invalidated the Amendment as being

unconstitutionally overbroad on its face. In reaching this result, the court of appeals ignored both the decisions of this Court and of the United States Courts of Appeals for the Eighth and Tenth Circuits.

"A 'facial' challenge . . . means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Inc.*, 455 U.S. 489, 499 n.5 (1982); *see Brockett v. Spokane Arcades, Inc.*, 472 U.S. ___, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Consequently, this Court has consistently admonished that the application of the facial overbreadth doctrine is "manifestly strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broaderick v. Oklahoma*, 413 U.S. 601, 613-614 (1973). This Court has " 'never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. . . .' " *Ferber*, 458 U.S. at 772.

A facial overbreadth analysis is applied less rigidly to statutes governing materials entitled to less than full First Amendment protection. In *Broaderick*, for example, it was noted that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment." 413 U.S. at 614-15. A statute should never be stricken for alleged facial overbreadth where a case-by-case analysis can obviate difficulties in construction:

> 'Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.' *Flipside*, 455 U.S. at 504.

Even when a facial overbreadth analysis is unavoidable, which certainly was not the case here, where conduct plus

speech is involved the overbreadth must be both "real" and "substantial" in relation to the statute's "plainly legitimate sweep." *Ferber*, 458 U.S. at 770, *quoting Broaderick*, 413 U.S. at 615; *Erznoznik*, 422 U.S. at 216.[2]

Despite this Court's strong admonitions against facial overbreadth invalidation, the court of appeals concluded that the Amendment was overbroad on its face because its "language is broad, and it does not provide any potential defenses or methods of compliance." (App. A at A-8). But the Amendment does not prohibit the examination, perusal or dissemination of proscribed materials by or to adults, any more than the rest of § 18.2-391 or the *Ginsberg* statute deny adults access to, and retailers the right to sell, materials "harmful to juveniles."

Such display provisions as the Amendment do "'not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question.'" *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985). "[T]he proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. * * * [A]dults may still have some access to materials not obscene as to them, and they may

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[2] Although the court of appeals below found that the Amendment involved pure speech, the Tenth Circuit has found otherwise in validating an ordinance similar to, but more restrictive than, the Amendment. *M. S. News Co. v. Casado*, 721 F.2d 1281, 1289 (10th Cir. 1983) ("The portion of the Wichita ordinance proscribing display to minors is conduct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself.")

The Eighth Circuit has concluded that, even if a display provision is not content-neutral, it is still permissible as "a reasonable means of attempting to control the merchandizing to minors of sexually explicit material obscene as to them." *Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1396 (8th Cir. 1985), *citing New York v. Ferber*, *FCC v. Pacifica Foundation*, and *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

purchase such material." *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983); *see also Ginsberg*, 390 U.S. at 634-35 (retailers not prohibited from stocking and selling magazines covered under the statute); *Pacifica Foundation*, 438 U.S. at 750 n.28 (adults still may purchase material despite restrictions).

As for the Fourth Circuit's concern that the Amendment does not list any potential defenses or methods of compliance, since the Amendment does not suffer from vagueness, a facial overbreadth analysis does not require that the statute itself list ways of compliance: so long as a limiting construction *could* be placed on the challenged provision, it is not facially overbroad. *See Broaderick*, 413 U.S. at 613. As long as it is clear what a display statute makes illegal, it need not spell out what a retailer must do to comply with it; this is left, for example, to the business policies he wants to adopt. *See Capital News Co., Inc. v. Metro. Gov't., etc.*, 562 S.W.2d 430, 433 (Tenn. 1978).

Moreover, the Amendment has a scienter requirement. This allows retailers to "avoid the hazard of self-censorship of constitutionally protected material," *see Ginsberg*, 390 U.S. at 644, and relieves them of the obligation to have an actual awareness of the contents of every book or magazine they sell or display. *See American Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919, 941 (Pa. Super. 1984); *Freeman v. Commonwealth*, 233 Va. 301, 311, 288 S.E.2d 461 (1982). The scienter requirement likewise allows the retailer to comply with the Amendment's display provision by making a good faith effort, by any means, to restrict juveniles from examining *and* perusing material that the bookseller actually knows or has reason to know is proscribed. Accordingly, Virginia suggested numerous ways to the court of appeals that a retailer could comply with the Amendment: the material could be placed in so-called "blinder racks," in wrappers preventing perusal or in "adult only" racks, display methods found by the Eighth and Tenth Circuits to be minimally intrusive. *See Upper Midwest Booksellers; M.S. News.* Even easier, perhaps,

tags could be placed on the materials in question, or they could be color coded. And, of course, the merchant would continue to have the protection of the applied overbreadth doctrine in questionable circumstances. *See Broaderick*, 413 U.S. at 615-16.

Simply put, then, the fact that a merchant might have to take some additional steps to segregate sexually explicit material does not mean that the Amendment is facially overbroad. Indeed, as in *New York v. Ferber*, "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity." 458 U.S. at 772.

All of this notwithstanding, the court of appeals below still found that the Amendment was facially overbroad under the *Erznoznik* test because a narrowing construction was not readily apparent. Yet, while the movie display ordinance in *Erznoznik* was invalidated because it was not sufficiently narrow, this Court suggested that Jacksonville's ordinance could have been saved if it had been restricted to movies obscene for minors; the City of Jacksonville and the Florida courts simply failed to suggest such a construction. 422 U.S. at 216, n.15.

The court of appeals below also found that the Amendment could not be saved as a valid time, place and manner regulation because it involves the content of the regulated speech. This conclusion is also in conflict with the Eighth and Tenth Circuits which have both held that such display provisions as the Amendment are valid time, place and manner regulations. *Upper Midwest Booksellers*, 780 F.2d at 1396-97; *M. S. News*, 721 F.2d at 1288, *citing Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Although it is true that the Amendment involves the "content of the regulated speech," in the sense that to be subject to the Amendment's requirements the material's contents must be "harmful to juveniles," this is no different than the theatres in *American Mini Theatres* being subject to Detroit's ordinance because of the content of the movies they showed. The point is that the Amendment does not attempt to regulate the contents of the speech: it simply requires that the speech be displayed in a manner so as to avoid harming children.

In his *American Mini Theatres* concurrence, Justice Powell stated, "We have here merely a decision by the city to treat certain movie theatres differently because they have markedly different effects upon their surroundings. . . ." 427 U.S. at 82, n.6. The same is true of the Amendment: We have here merely a decision by the General Assembly of Virginia to treat the display of certain materials differently because they have recognized harmful effects upon children. In any event, as this Court recently observed, Justice Powell further stated in *American Mini Theatres:*

> "'[E]ven if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.'"

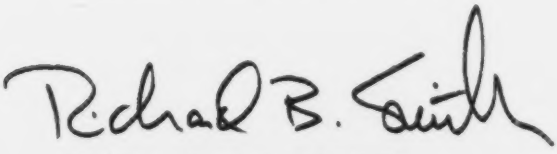
Renton v. Playtime Theatres, ____ U.S. ____, 106 S.Ct. ___, 89 L.Ed.2d 29, 39 (1986).

CONCLUSION

The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court, surely one of the most significant events possible under our system of federalism; the Fourth Circuit's judgment has created a clear conflict among the federal courts of appeals; at least twenty-eight (28) states and several localities have provisions concerning the display of pornographic materials to minors in one form or another (App. L at 46); and, lastly, "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg*. *See Rendell,* 481 A.2d at 942. This substantial and important issue is worthy of this Court's full consideration.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia



RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

December 24, 1986

APPENDIX

PUBLISHED

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1961 (L)

American Booksellers Association, Inc.; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.: Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

Commonwealth of Virginia,

Appellant.

and

Charles T. Strobel; William K. Stover,

Defendants.

No. 85-1999

American Booksellers Association, Inc.,; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.; Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

William K. Stover,

Appellant,

and

Charles T. Strobel,

Defendant.

CORRECTED MODIFIED OPINION
NEW PAGE 2

No. 85-2284

American Booksellers Association, Inc.
Association of American Publishers;
Council for Periodical Distributors
Association; International Periodical
Distributors Association, Inc.; National
Association of College Stores, Inc.;
Books Unlimited, Inc. and Ampersand Books,

and

Appellants,

Amy Bush and Jessica Bush,

versus

Plaintiffs,

Charles T. Strobel; William K. Stover
and the Commonwealth of Virginia,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A 85-816-A).

Argued: February 5, 1986 Decided: September 30, 1986

Before PHILLIPS and SPROUSE, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Ara L. Tramblian, Assistant County Attorney (Charles G. Flinn, Arlington County Attorney on brief) for Appellant/cross-appellee William K. Stover; Richard B. Smith, Assistant Attorney General (William G. Broaddus, Attorney General; Mary Sue Terry, Attorney General; John H. McLees, Jr., Assistant Attorney General on brief) for Appellant/cross-appellee Comonwealth of Virginia; Michael A. Bamberger (David C. Burger; Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey on brief) for Appellees/cross-appellants.

SPROUSE, Circuit Judge:

This appeal concerns the constitutionality of a 1985 amendment to a Virginia statute which attempts to shield juveniles from the commercial display of sexually explicit material. The defendants, the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County, Virginia, appeal from the district court's order declaring unconstitutional the amendment to Virginia Code § 18.2-391(a) and permanently enjoining them from enforcing the amendment.[1] The plaintiffs, the American Booksellers Association, Inc., four other trade associations, and two retail bookstores (hereinafter collectively referred to as the Booksellers) appeal from the district court's denial of attorneys' fees. We affirm the district court's decision that the amendment is unconstitutional, but reverse its denial of plaintiffs' attorneys' fees.

The pre-amendment statute, for some years, has prohibited the sale to minors of sexually explicit materials defined as harmful to juveniles, including some materials which are not obscene as to adults. The constitutionality of that underlying statute is not in issue in this appeal. The Virginia General Assembly amended the statute, however, effective July 1, 1985, making it unlawful to knowingly display these materials "in a manner whereby juveniles may examine and peruse" them. Va. Code § 18.2-391(a) (Supp.

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[1] Charles T. Strobel, Director of Public Safety for the City of Alexandria, Virginia, was named as a defendant in the district court, but has not appealed from that court's judgment.

1985).[2] Approximately two weeks after the effective date of the amendment, and prior to any enforcement action by the defendants, the Booksellers brought this action asserting that the amendment is facially unconstitutional.[3] They sought declaratory and injunctive relief to prevent its enforcement as well as costs and attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). After a hearing on the defendants' motion to dismiss, the district court declared the amendment unconstitutional and enjoined its enforcement.

The Commonwealth and Stover appeal the district court's finding that the Booksellers had standing to attack the amendment and the Commonwealth also appeals that court's ruling that the amendment is facially unconstitutional as violative of the first amendment.

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[2] The amended section 18.2-391(a) provides that:

> It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(Emphasis supplied to show language added by the 1985 amendment.)

[3] The action was based on federal constitutional provisions, as well as 42 U.S.C. § 1983 (1982) and 28 U.S.C. §§ 2201 and 2202 (1982).

I.

To survive an initial attack challenging standing, a plaintiff must show that an actual controversy exists and must allege a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Commonwealth and Stover contend that the Booksellers have not demonstrated an actual case or controversy. They point out that there has been no proof that the Booksellers have been prosecuted, threatened with prosecution, or have detrimentally changed their behavior as a result of the amendment.

We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion,

they face the prospect of prosecution.[4] Particularly applicable here is the rule that, in order to maintain standing in a first amendment case, a plaintiff does not have to expose himself to prosecution when a statute imposes a criminal penalty. When the threat of prosecution is not chimerical, it is sufficient that he claims that the statute deters the exercise of constitutionally protected rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).[5]

In short, we find that the Booksellers meet the requirements for standing in this case.

II.

Turning to the underlying first amendment issue, there is no question that a state government has an interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). The *Ginsberg* Court

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[4] The facts of this case distinguish it from our recent decision in *Doe v Duling*, No. 85-1326 (4th Cir. Feb. 7, 1986), which challenged on privacy grounds a nineteenth century fornication statute which had not been enforced in private homes for years, if not decades. In the instant case, the amendment is newly enacted. It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced. Additionally, this is a first amendment case. In the context of threats to the right of free expression, courts justifiably often lessen standing requirements. As the Supreme Court said in a recent discussion of this issue, in first amendment cases "the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Maryland v. J. H. Munson Co.*, 104 S.Ct. 2839, 2847 (1984). *See Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1391 n.5 (8th Cir. 1985).

[5] The Commonwealth also attacks the standing of the various trade associations to sue as representatives of their member retail and wholesale businesses. The prerequisites for associational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 33, 342-43 (1977) are present in this case, and we see no merit to this aspect of the Commonwealth's argument.

upheld a New York law prohibiting the sale to minors of sexually explicit materials which were defined as harmful to juveniles. The pre-amendment Virginia statute was modeled after the statute sanctioned in *Ginsberg*.[6] The Booksellers, however, do not attack the constitutionality of the pre-amendment statute. They assert, instead, that the display provision of the amendment will unreasonably restrict adult access to materials protected under the first amendment. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F. Supp. 50, 56 (N.D. Ga. 1981).

The Commonwealth concedes that adults' first amendment rights cannot be limited by the restrictive obscenity standards which may be applied to juveniles. *Butler v. Michigan*, 352 U.S. 380 (1957).[7] It contends, nevertheless, that the stricter standards of the amendment's display provision can be applied so as to screen juveniles from potentially harmful material without infringing on the rights of adults to have access to the same sexually explicit material. It argues that the district court erred when it found that the statute under review does not accommodate the state's interest in protecting juveniles in the least restrictive fashion and that the amendment is facially overbroad.

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[6] The General Assembly modified the definition of materials considered harmful to juveniles to parallel the obscenity standards detailed in *Miller v. California*, 413 U.S. 15 (1973).

[7] We also question whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. "[M]inors are entitled to a significant measure of First Amendment protection" and the government may restrict these rights "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). These restrictions are justified when a child is not possessed of a full capacity for individual choice, and, in assessing that capacity, the age of the minor is a significant factor. *Id.* at 214 n.11. While the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application.

A court will not find a statute facially invalid unless: (1) it cannot easily be given a narrowing construction; and (2) it has both a real and substantial deterrent effect on protected expression. *Erznoznik*, 422 U.S. at 216. The Commonwealth urges that narrowing construction were readily available to the district court. Specifically, it asserts that the prohibited materials can still be stocked by the Booksellers so long as the materials are displayed in a manner whereby juveniles cannot examine and peruse them.

The Commonwealth asserts that the amendment is a valid time, place, and manner regulation such as the zoning ordinance upheld in *Young v. America Mini Theatres, Inc.*, 427 U.S. 50 (1976). While it is true that the Supreme Court has upheld reasonable time, place, and manner restrictions, the speech so regulated either occurred in the public forum or was subject to a general zoning ordinance. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *Young*, 427 U.S. 50. The state's interest in regulating activities in public places is, of course, of a somewhat different character than its interest in what goes on in a private bookstore. Even under the time, place, and manner analysis, however, the amendment must fall because the governmental interest asserted in this type of regulation must not involve the content of the regulated speech. *Clark*, 468 U.S. 288. There is no question that the Virginia amendment imposes restrictions based on the content of publications.

The amendment's most serious flaw, however, is its breadth. A demonstrably overbroad regulation may act as a deterence to the exercise of constitutionally protected rights. *Erznoznik*, 422 U.S. at 216. In the instant case, the amendment's language is broad, and it does not provide any

potential defenses or methods of compliance.[8] The Commonwealth, nonetheless, asserts that compliance with the amendment would not deter the exercise of first amendment rights. It stresses that only a small percentage of the inventory in book stores could be classified as harmful to juveniles and argues that retail outlets can readily modify their display methods to comply with the amendment. Because of its recent passage, no one has yet been prosecuted under the Virginia amendment. Additionally, there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.[9] It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale. *See American Booksellers Association, Inc. v. Webb*, 590 F. Supp. 677, 692-93 (N.D. Ga. 1984).

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[8] As we note, *infra*, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute. Technically, however, the ordinance upheld in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), is distinguishable from the Virginia statute which we review in that it specifically provides that material kept behind "blinder racks" was not deemed to have been "displayed." Similarly, retailers were able to comply with the ordinance in *Upper Midwest Booksellers*, 780 F.2d 1389, by placing the materials behind opaque covers, in sealed wrappers, or in "adults only" settings.

[9] The district court heard testimony from three witnesses in order to "flesh out" the pleadings and provide a more complete record. The bookstore owners testified that they felt between 30 and 50% of their inventory was covered by the display provision. The Commonwealth argues that only a "minuscule percentage" of the plaintiffs' inventory would be involved. The district court found that a significant percentage of the inventory of the average general bookstore, varying between 5 and 25%, falls within the amendment's restrictions.

The Commonwealth suggests a number of ways by which the book retailer may solve these problems, but none appears to us to significantly ease the first amendment burden created by the amendment. The display methods suggested by the Commonwealth appear either insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults, and, to this extent, we disagree with the rulings in *M. S. News* and *Upper Midwest Booksellers*. Placing "adults only" tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials. The statute requires that such materials not be displayed so that minors *may* have access to them. Forcing a bookseller to create a separate, monitored adults only section, requiring that the materials be sealed, or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices. Contrary to the Commonwealth's argument that the scienter requirement in the statute allows a book retailer to avoid the hazards of self censorship, each of these suggested practices would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment. More importantly, a retailer cannot rely on the amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute.

In sum, we feel that the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreath challenge. We, therefore, affirm the district court's judgment declaring the challenged amendment unconstitutional and enjoining its enforcement.

III.

The Booksellers appeal the district court's denial of their application for attorneys' fees pursuant to 42 U.S.C. § 1988. The prevailing party in a § 1983 action should ordinarily recover attorneys' fees absent special circumstances which would render the award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The district court's normally broad discretion in this area is narrowly limited both by the reasoning of *Newman* and by Congress' later explicit approval of that standard in enacting the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In denying the plaintiffs' application, the district court noted that the Booksellers could pass on the cost of litigation to their customers in the form of higher prices, that the Commonwealth acted in good faith, and that the Booksellers were the primary beneficiaries of the action striking down the statute. The court recognized that none of these factors alone would constitute the necessary special circumstance to justify denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land." The district court cited no authority for the action, and we find none.

Although the Booksellers certainly benefit from the results of this litigation, the citizens of Virginia will likewise continue to enjoy unfettered freedom of expression. We do not find it unjust that the taxpayers will have to bear the costs of the award. *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979).

As to defendants Strobel and Stover, however, we feel that circumstances would make the award of attorney fees against them unjust. At the time of their involvement there was, of course, no court interpretation concerning the constitutionality of the Virginia statute. Their actions were pursuant to a duly enacted state statute, and when they were named as defendants, they did not defend the statute on its merits as did the intervening Commonwealth.

In view of the above, the district court's denial of attorney fees is reversed insofar as it related to the Commonwealth of Virginia, and is remanded to the district court with instructions to assess attorney fees against the Commonwealth. The district court's decision denying attorney fees against defendants Strobel and Stover is affirmed.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

FILED SEP 26, 1986
U.S. Court of Appeals
Fourth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961
No. 85-1999
No. 85-2284

American Booksellers Association, Inc., et al,

Appellees,

versus

Commonwealth of Virginia, et al,

Appellants.

and

Charles T. Strobel, et al,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc is denied by a panel consisting of Judges Phillips, Sprouse and Haynsworth.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Widener, Russell, Chapman and Wilkins voted in favor of rehearing in banc; and Judges Winter, Hall, Phillips, Murnaghan, Sprouse and Ervin voted against rehearing in banc. Judge Wilkinson noted he was disqualified. The majority of the Judges having voted against rehearing in banc, it is ordered that rehearing in banc is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judges Phillips, Sprouse and Haynsworth.

For the Court,

/s/ JOHN M. GREACEN
CLERK

FILED
OCT 7, 1986
U.S. Court of Appeals
Fourth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-1961
NO. 85-1999
NO. 85-2284

American Booksellers Association, Inc., et al,

Appellees,

versus

Commonwealth of Virginia, et al,

Appellants,

and

Charles T. Strobel, et al,

Defendants.

ORDER

Upon consideration of the appellants' motions for a stay of mandate,

IT IS ORDERED that the motions for a stay of mandate are granted and the mandate is hereby stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Judge Sprouse with the concurrence of Judge Phillips and Judge Haynsworth.

For the Court,

/s/ JOHN M. GREACEN
CLERK

FILED
SEP 10, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS ASSOCIATION, et al.,

Plaintiffs,

v. Civil Action No. 85-816-A

CHARLES T. STROBEL, Director of Public Safety, et al.,

Defendants.

ORDER

This matter comes before the Court on defendants' motion to dismiss, and on a trial to the bench on August 5, 1985. For reasons stated in the accompanying memorandum opinion, the defendants' motion to dismiss is GRANTED as to plaintiffs Jessica and Amy Bush, and DENIED as to the other plaintiffs.

Furthermore, for reasons stated in the accompanying memorandum opinion, the Court FINDS in favor of the plaintiffs, DECLARES the 1985 Amendment to Virginia Code § 18.2-391 unconstitutional, and PERMANENTLY ENJOINS the defendants from enforcing the amendment.

Let the Clerk send a copy of this order to all counsel of record.

Date: 9/10/85

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

FILED
SEP 10, 1985
Clerk, U.S. District Court
Alexandria, Virginia

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

AMERICAN BOOKSELLERS ASSOCIATION, et al.,

Plaintiffs,

v. Civil Action No. 85-816-A

CHARLES T. STROBEL, Director of Public Safety, et al.,

Defendants.

MEMORANDUM OPINION

Introduction

This matter comes before the Court on a trial to the bench on September 5, 1985. Plaintiffs challenge the constitutionality of the 1985 Amendment to § 18.2-391 of the Code of Virginia. The relevant statutes are set out below, and the challenged portion (hereafter "the amendment") is highlighted:

§ 18.2-390. Definitions.—As used in this article:

(1) "Juvenile" means a person less than eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual

stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to Juveniles" means that quality of any description or representation, in whatever form, or nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

§ 18.2-391. Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

The named defendants are charged by law with the duty of enforcing the challenged portion of the statute. The Attorney General of Virginia has exercised his right to intervene pursuant to 28 U.S.C. § 2403(b).

The plaintiffs here are five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. They contend that the 1985 Amendment is facially invalid in that it unconstitutionally infringes upon rights protected by the first amendment, and in that it constitutes a prior restraint upon free speech. Defendants argue that there is no case or controversy between themselves and the plaintiffs, that plaintiffs do not have standing to challenge the Amendment, that the Court should abstain from considering the constitutionality of the Amendment, and that in any event the Amendment does not violate the first amendment.

Pursuant to Rule 52(a), the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Helen Ross is the owner of plaintiff Ampersand Books, an Alexandria bookstore belonging to the American Booksellers Association. Ampersand Books carries approximately 12,000-13,000 different titles at any one time, with multiple copies of most titles. The books are arranged in sections according to subject matter, including children's books, science fiction, mystery, fiction, romance, art, health, photography and best sellers. Children frequently shop at Ampersand Books, often with their parents, and sales of children's books constitute approximately 10% of Ampersand's business. In terms of its size, structure and clientele, Ampersand is similar to many other Northern Virginia bookstores that carry a wide variety of titles.

Carol Johnson is the owner of plaintiff Books Unlimited, an Arlington bookstore that belongs to the American Booksellers Association. Books Unlimited is somewhat atypical in that it relies more heavily upon sales of children's books than other area bookstores. However, approximately 10-15% of its books may not be displayed under the new law. The store's books are arranged by subject matter in a manner similar to the structure at Ampersand Books.

In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content. Therefore, at least one copy of every title carried by Ampersand Books is on display.

Based upon the testimony of two local bookstore owners, and after carefully reviewing the exhibits introduced from their stores, the Court concludes that the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are "harmful to juveniles" as defined in the statute. The books that fall within the restrictions come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health. Most of these books come within the statute's fairly broad ambit on the basis of their content. However, the Court finds that the covers of some books and magazines, as sexually explicit "pictures" and "photographs" under the statute, are also covered by the statute.

In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. However, this alternative would certainly

have a dramatic impact upon the store's sales of children's books. Moreover, such a move would create the impression that the store deals primarily in "adult only" or pornographic material, which would have a devastating impact upon the store's business.

Second, the store could create an "adult only" section in order to display the proscribed material. However, the books covered by the statute come from a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers; books which are "harmful to minors" are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section. An "adult only" area would be costly to create, difficult to monitor, and would create a great deal of confusion in the mind of a consumer searching for a particular book. Moreover, many adults would be reluctant and embarrassed to browse in an "adults only" corner of the store, and sales of books placed in this new area would undoubtably drop.

Third, the bookstore could simply limit its inventory to books not regulated by the new law. However, since the new law would restrict the display of a number of very popular books, including some best sellers, this alternative is not commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because bookstores rarely have the opportunity to review books before ordering them.

Finally, the bookstore could place all of the prescribed material behind a counter where they would not be displayed to the public. However, due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores. Moreover, since the display of books is so crucial to their sale, such a move would substantially hurt sales.[1]

CONCLUSIONS OF LAW

A. Case or controversy and standing requirements

Initially, the Court must determine whether an actual case or controversy exists, and whether the plaintiffs have standing to challenge the constitutionality of the new amendment. The "case or controversy" doctrine does not mean that a plaintiff must be arrested or prosecuted before he or she may challenge the constitutionality of a statute. *Steffel v. Thompson,* 415 U.S. 452 (1974). However, a plaintiff must be able to assert a reasonable fear of enforcement of the statute, and that therefore the allegedly unconstitutional statute interferes with how the plaintiff ordinarily conducts his or her affairs. *Entertainment Concepts, Inc., III v. Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981); *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979).

Similarly, in order to satisfy the requirement of standing, a litigant must demonstrate that he or she is somehow adversely affected by the challenged statute. This requirement is not satisfied if the party merely asserts the common interest of society as a whole in having a judicial determination on the matter. In short, a litigant must demonstrate a "personal stake" in determining the validity of the law, so that the controversy before the Court is both "real and substantial." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937).

Where first amendment rights are at stake, case or controversy and standing requirements have been relaxed so that litigants may preserve rights of free expression. *See Secretary of State v. Munson,* ___U.S.___, 81 L.Ed 2d 736, 796 (1984) ("where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided wherever possible may be outweighed by society's interest in having the statute challenged"); *see also Broadrick v. Oklahoma,* 413 U.S. 601, 611 (1973) (challenge to statute

restricting political activities of state civil servants permitted since the statute's existence may discourage persons not before the Court from engaging in protected speech). This relaxed stance reflects the treasured position occupied by the first amendment, and the consequent importance of having first amendment controversies adjudicated promptly.

The evidence in the record clearly establishes that a real controversy exists and that the individual bookstores have standing to challenge the 1985 amendment. The bookstores have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses. Furthermore, the retail associations also have standing in this matter because they are representatives of bookstores who are suffering immediate or threatened injury as a direct result of the challenged statute. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (trade association has standing to bring suit on behalf of its members if its members would otherwise have standing, if the interests to be protected are germane to the purpose of the organization, and if the suit does not require the participation of the individual members); *see also Warth v. Selden,* 422 U.S. 490 (1975).

The individual plaintiffs, Jessica Bush and her minor daughter Amy Bush do not have standing to challenge the amendment. Jessica and Amy Bush claim that they have standing simply as adult and juvenile members of the community. However, neither has alleged that they would be subject to prosecution under the challenged amendment, nor do they allege any economic loss as a result of the new law. The Bushes have failed to assert anything more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores. *See American Booksellers Association v. Rendell,* 481 A.2d 919, 932 (Pa. Super. 1984).

B. Abstention

Defendant contends that the Court should abstain in this case so that state courts may be given the opportunity to construe the 1985 amendment and determine its constitutionality. However, this case does not fit within any of the three narrowly defined areas where abstention by a federal court may be appropriate. Specifically, state court resolution of this matter would not render unnecessary, nor substantially modify the federal constitutional questions; there are simply no difficult or unclear issues of state law raised here. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention may be appropriate where the case presents unsettled questions of state law); *see also Younger v. Harris*, 401 U.S. 37 (1971) (abstention may be appropriate where there is a constitutional challenge to ongoing state criminal proceedings); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstention may be appropriate where there is an adequate state regulatory forum for review of the claims, and where that forum is the most appropriate forum due to the presence of basic state policy considerations). Further, the significant first amendment questions raised by the plaintiffs' claims clearly make abstention inappropriate. *See American Booksellers Association v. McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981) (declaring Georgia statute restricting display of certain sexually explicit materials unconstitutional).

Overbreadth

As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The Supreme Court has upheld restrictions based upon content "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983). Therefore, the challenged amendment, which clearly restricts access to certain materials on the basis of

their content, must be carefully examined to ensure that it does not impermissibly infringe upon first amendment values.

The sole justification offered by the defendants for the challenged amendment is the government's interest in shielding minors from certain adult reading material.[2] The Supreme Court, recognizing that the state may play some role in promoting the moral well-being of its youth, has upheld the constitutionality of laws which prohibit the *sale* of materials which, though not obscene as to adults, were deemed to be "harmful to minors." *Ginsberg v. New York*, 390 U.S. 629 (1968).[3] The defendants assert that the 1985 amendment, which prohibits the *display* of non-obscene material in a manner whereby one under the age of 18 *may* peruse it, is constitutionally permissible under *Ginsberg*.

The Court disagrees. In promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court struck down a Michigan law which made it unlawful for anyone to "make available for the general reading public . . . a book . . . found to have a potentially deleterious influence on youth." 352 U.S. at 382-83. Writing for a unanimous Court, Justice Frankfurter rejected a contention similar to the one offered by the defendants here:

> The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383. Here, as in *Butler*, the challenged statute is "not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383.

Over 25 years after *Butler*, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a federal statute which made it illegal to mail to the public unsolicited materials dealing with contraceptives, venereal disease and family planning. The defendant in *Bolger*, like the defendant in *Butler*, argued that the law should be upheld because it protected minors from materials that their parents might find objectionable. The Supreme Court again unanimously rejected this contention:

> We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children.' *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

__U.S. at __, 103 S.Ct. at 2884. *See also Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (statute prohibiting the distribution of sexually explicit materials over cable television declared unconstitutional on grounds of overbreadth).

The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981); *Tattered Cover v. Tooley*, 696 P. 2d 780 (Col. Sup. Ct. 1985); *American Booksellers Association, Inc. v. Superior Court*, 129 Cal. App. 3d 1971, 181 Cal. Rptr. 33 (1982). The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the

unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible.

Faced with the restrictions in the display amendment, a bookstore would be forced either to discontinue carrying the restricted materials, ban minors from its store altogether, or restructure their stores and move a significant portion of its inventory. Due to the wide sweep of the statute, a number of classic literary works, romances, and best sellers would have to be placed behind the counter or into monitored "adults only" areas. As noted earlier, these alternatives are commercially impractical. Moreover, they force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature. Finally, they might also require the adult to go into a stigmatized "adults only" area to examine the materials; these extra steps would certainly be embarrassing to many adults, and they may very well inhibit many individuals from exercising their right to examine and purchase the material.

The Attorney General suggests that a bookseller may comply with the amendment by simply placing tags on the prescribed books, or by placing them on special "adult only" racks. This interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is "on display" where the juvenile "may" examine it even if the item is tagged. Indeed, since the material may well have pictures or passages "harmful to minors" on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks.

The Attorney General also urges the Court to uphold the challenged display provision as a valid time, place and manner restriction on speech. The "crucial question" in examining a regulation under the time, place and manner test is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). The manner of expression here—the display of the books or other materials—is unquestionably compatible with the activity of the places affected by the rgulation—bookstores, art galleries, convenience stores and department stores. Because the amendment does not regulate expression incompatible with the normal activity of the affected businesses, the amendment here is not a valid time, place and manner restriction.[4]

Moreover, a valid time, place or manner restriction must serve a substantial government interest, and it must be drawn with narrow specificity to be no more restrictive of protected communications than necessary.[5] *Grayned v. City of Rockford,* 408 U.S. 104, 116-117 (1972); *Davenport v. City of Alexandria,* 710 F.2d 148 (4th Cir. 1983). While the purpose of the restriction here is to serve a substantial governmental interest, the restriction is far broader than necessary. Without passing upon the constitutionality of any alternative measures, the Court notes that a law simply forbidding the actual perusal by minors of these harmful materials, or at least requiring the use of "blinder racks,"[6] would be far narrower than the amendment challenged here.[7]

Plaintiffs also challenge the Virginia law on the grounds that it constitutes a prior restraint upon protected speech, and that it unreasonably restricts the access of more mature minors to material which is not obscene as to them. The Court's rulings on plaintiff's overbreadth claim makes it unnecessary to reach the merits of these contentions.

In light of the foregoing, the Court concludes as a matter of law that the 1985 amendment to Virginia Code § 18.2-391(a) is facially invalid for overbreadth. Moreover, it cannot be saved by any narrowing construction. Therefore, the defendants are hereby PERMANENTLY ENJOINED from enforcing the amendment.

An order will be entered in accordance with this opinion.

Footnotes

[1]The Court notes with some concern that, with respect to most of the above alternatives, bookstores might not be able to continue their practice of hiring minors for part time positions.

[2]Obviously, the materials regulated by the Amendment are not "obscene" under *Miller v. California*, 413 U.S. 15, 24 (1973), and are therefore entitled to first amendment protection.

[3]The *Ginsberg* decision, as modified by *Miller*, has been codified by Virginia in Virginia Code § 18.2-390, 391 (1984).

[4]To the extent that the Court in *M. S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) held that a somewhat similar Wichita City ordinance was a valid time, place and manner restriction, the Court respectfully disagrees.

[5]Although valid time, place and manner restrictions must generally be content neutral, the Supreme Court has carved out an exception to this general rule where, as here, the restriction is targeted toward a juvenile audience. *See Young v. American Mini Theatres*, 427 U.S. at 85-86 (Justice Stewart, dissenting).

[6]In the *Casado* case, the 10th Circuit upheld the constitutionality of a display ordinance somewhat similar to the regulation before this Court. However, in *Casado*, the challenged ordinance permitted the display of materials "harmful to minors" so long as the materials were kept behind "blinder racks" that covered the lower two-thirds of the material from view.

[7]It may be that laws prohibiting the sale of these materials are already the narrowest permissible restrictions, and that displays of such materials are simply a part of the "multitude of external stimuli" in sensitive areas with which parents must cope. *See Bolger*, 463 U.S. at 73.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

DATE: 9/10/85

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

ORDER

This matter is before the Court on plaintiffs' application for costs, pursuant to 42 U.S.C. 1988. Defendants have objected to plaintiffs' application and have requested that the fees demanded be reduced. For the reasons stated below, the Court DENIES plaintiff's application and disallows all fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action under 42 U.S.C. Section 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988. In exercising its discretion, the court is controlled by the standard set forth in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Under that standard, a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. *See also Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In this case, the Court finds just such special circumstances.

This case, *American Booksellers*, was a carefully orchestrated attack on a Virginia statute. The statute at issue made it unlawful to display commercially certain materials

deemed harmful to juveniles in such a manner that children could examine and peruse them. *See* Sections 18.2-390 to 391 of the Virginia Code. This statute peculiarly affected one entity, the bookselling industry, and it was that industry that masterminded the assault. Through its attorneys, the industry carefully selected a broad spectrum of litigants to ensure standing. The original plaintiffs included five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. It chose a forum it considered desirable, *i.e.*, one of the more liberal sections of the state, where success at trial was considerably less [sic] likely. And, perhaps most importantly, it filed a 1983 action, even though a declaratory action based on the First Amendment itself would have been more than sufficient. The added attraction of 1983, of course, was the provision for attorneys fees.

When the battle was over and the statute struck down, the beneficiary was, once again, the bookselling industry. With the statute on the books, the industry had faced a massive loss of profits but, through this suit, it managed to protect these revenues. In other words, from the beginning, this case was a suit by a private industry, for a private industry. It is that industry that should now bear the expense, simply as a cost of doing business. To do otherwise would be unfair. The taxpayers should not have to bear the expense of a suit that redounded to the benefit of one industry and one industry alone.

The Court does not mean to suggest that the bookselling industry acted improperly in bringing this case. Nor does it mean to downgrade the importance of this case or the principles it upholds. Freedom of speech and thoughts are of paramount importance and admittedly work to everyone's benefit. However, to the extent that the public benefited, it can pay for that benefit through a one or two cent increase in the price of books. This would effectively spread the cost of the suit and seems more equitable than saddling the State with the bill. The State here acted in good faith, in support of a cause that all must find worthy—the

protection of children. Moreover, the State could not have known that its actions would be found to be unconstitutional since this is a novel area of law.

The Court realizes that probably none of these factors standing alone would justify shielding the State from paying attorney fees. For instance, the law is clear that good faith by itself is not a special circumstance that would make an award of attorney fees unjust. *See, e.g., Anderson v. Morris,* 658 F.2d 246 (4th Cir. 1976). However, with all these factors combined, the Court finds it more equitable to let the costs lie where they land. Those who have benefited the most (which includes the book-buying public) will pay the slight cost of that benefit, and the State will not be penalized for its well-intentioned effort to protect its children.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Oct. 23, 1985

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

FILED
JUL 22, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, INC., *et al.*
Plaintiffs,

v. Civil Action No. 85-816A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, *et al.*
Defendants.

ORDER AND CERTIFICATION OF CONSTITUTIONAL QUESTION

This matter is before the Court on Plaintiffs' Application for a Temporary Restraining Order, seeking to enjoin enforcement by Defendants of an amendment to Section 18.2-391 of the Code of Virginia pending a decision on the merits of this case. Counsel for all parties have appeared and have been heard, and it now is ORDERED that:

1. The Application for a Temporary Restraining Order be, and hereby is, continued, based upon representations by defense counsel that Defendants will voluntarily refrain from enforcing said Amendment pending further proceedings herein; *provided, however* that counsel for Plaintiffs may, by telephone application or otherwise, renew their request for interim relief in the event circumstances so warrant;

2. It appearing to this Court that, pursuant to 28 U.S.C. § 2403(b), this is an action wherein the constitutionality of a statue of the Commonwealth of Virginia affecting the public interest has been drawn into question, it is hereby

ORDERED that such fact be, and hereby is, certified to the Attorney General of the Commonwealth, who shall be provided copies of the Complaint and Motions filed herein, and be permitted to intervene on behalf of the Commonwealth, to present evidence and to argue the question of constitutionality, if, in his discretion, such intervention is necessary and proper.

3. It is further ORDERED that the Attorney General advise the Court, and all counsel, of his decision regarding intervention no later than July 26, 1985; that, in the event the Attorney General does intervene, he file any pleadings and memoranda by August 2, 1985; and that the hearing for a preliminary injunction in this matter be scheduled for 10:00 a.m. on August 9, 1985.

July 22, 1985 — /SGD/ Richard L. Williams
Richard L. Williams
Date — U.S. District Court Judge

Copies to: All Counsel of Record
Attorney General of Virginia

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, INC., et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

MOTION TO INTERVENE

Comes now the Attorney General of Virginia, by counsel, and moves this Court pursuant to Rule 24(a) and (c), *Federal Rules of Civil Procedure,* to allow him to intervene on behalf of the Commonwealth of Virginia under 28 U.S.C. § 2403(b) in this action wherein the constitutionality of the 1985 amendment to § 18.2-391 of the Code of Virginia, which affects the public interest, has been drawn into question.

Respectfully submitted,

ATTORNEY GENERAL OF VIRGINIA,

By: /s/ Richard B. Smith
Counsel

Richard B. Smith
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1985, a copy of the foregoing Motion To Intervene was filed with the United States District Court for the Eastern District of Virginia and that copies thereof were mailed to Victor M. Glasberg, Esquire, 1007 King Street, P. O. Box 1610, Alexandria, Virginia 22313, and to Robert S. Plotkin, Esquire, 1140 Connecticut Avenue, No. 400, Washington, D.C. 20036, Counsel for Plaintiffs. Copies were also mailed to Ara M. Tramblian, Assistant County Attorney, 1400 North Courthouse Road, Room 106, Arlington, Virginia 22201, Counsel for Defendant William K. Stover, and to Robert L. Murphy, Deputy City Attorney, City Attorney's Office, City Hall, Alexandria, Virginia 22314, Counsel for Defendant Charles T. Strobel.

/s/
Richard B. Smith
Assistant Attorney General

FILED
NOV 19, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, INC., et al.
Plaintiffs,

v. Civil Action No. 85-0816-A

CHARLES T. STROBEL, et al.
Defendants.

ORDER

This matter is before the Court on Plaintiffs' motion for reconsideration of denial of attorneys' fees. For reasons stated from the bench, the Court hereby DENIES plaintiffs' motion.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: Nov. 19, 1985

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR OF PUBLIC SAFETY, et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Attorney General of Virginia, intervenor herein, hereby appeals to the United States Court of Appeals for the Fourth Circuit from this Court's Order of the 10th day of September, 1985, declaring the 1985 Amendment to Virginia Code § 18.2-391 unconstitutional and permanently enjoining the defendants herein from enforcing the amendment.

ATTORNEY GENERAL OF VIRGINIA,
Intervenor herein.

By: /s/ Richard B. Smith
Counsel

Richard B. Smith
John H. McLees, Jr.
Assistant Attorneys General

101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1985, copies of the foregoing Notice of Appeal were mailed to Victor M. Glasberg, Esquire, 1007 King Street, P.O. Box 1610, Alexandria, Virginia 22313, and to Robert S. Plotkin, Esquire, 1140 Connecticut Avenue, No. 400, Washington, D.C. 20036, Counsel for Plaintiffs. Copies were also mailed to Ara M. Tramblian, Assistant County Attorney, 1400 North Courthouse Road, Room 106, Arlington, Virginia 22201, Counsel for Defendant William K. Stover, and to Robert L. Murphy, Deputy City Attorney, City Attorney's Office, City Hall, Alexandria, Virginia 22314, Counsel for Defendant Charles T. Strobel.

/s/ Richard B. Smith
Assistant Attorney General

APPENDIX J

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX K

Va. Code § 18.2-390

Definitions.—As used in this article:

(1) "Juvenile" means a person less than eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to Juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

Va. Code § 18.2-391

Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

APPENDIX L

Many states have laws concerning the display or exhibition of pornographic materials to juveniles, and no doubt many local jurisdictions have such provisions as well. A list of state laws on this subject is as follows:

Ala. Code §§ 13A-12-171, -174 (1982)
Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (1978)
Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1983)
Del. Code Ann. Tit. 11, §§ 1361, 1365 (1979)
Fla. Stat. Ann. §§ 847.012, .013 (West 1976 & Supp. 1984)
Ga. Off. Code Ann. §§ 16-12-102 to 104
Ind. Code § 35-49-3-3 (Supp. 1986)
La. Rev. Stat. Ann. § 14:91.11 (Supp. 1984)
Me. Rev. Stat. Ann. Tit. 17, § 2911 (1983 & Supp. 1983-84)
Md. Ann. Code Art. 27, § 419 (1982 & Supp. 1983)
Miss. Code Ann. §§ 97-5-27, -29 (Supp. 1983)
Mo. Ann. Stat. §§ 573.040, .060 (Vernon 1979)
Mont. Code Ann. §§ 45-8-201, -202 (1983)
Neb. Rev. Stat. §§ 28-807, -808, -809 (1979)
Nev. Rev. Stat. §§ 201.256 to .265 (1957)
N.J. Stat. Ann. §§ 2C:34-3, -4 (West 1982)
N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980)
N.Y. Penal Law § 245.11 (McKinney 1980)
N.C. Gen. Stat. §§ 14-190.13, .14 (Supp. 1985)
N.D. Cent. Code § 12.1-27.1-03.1 (Repl. Vol. 1985)
R.I. Gen. Laws § 11-31-10 (Supp. 1983)
S.C. Ann. §§ 16-15-290, -390 (Supp. 1983)
S.D. Codified Laws Ann. §§ 22-24-27, -29.1, -30 (1979)
Tenn. Code Ann. § 39-6-1136 (1982)
Tex. Penal Code Ann. § 43.24 (1974)
Va. Code § 18.2-391 (1982)
Vt. Stat. Ann. Tit. 13, § 2804b (Supp. 1983)
W.Va. Code §§ 61-8A-1, -2

These state laws vary in language. Those corresponding fairly closely to Virginia's statutory scheme are the following ones:

Ala. Code §§ 13A-12-170, -171 (1982)
Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (West Supp. 1978)
Fla. Stat. Ann. §§ 847.012, .013 (West 1976 & Supp. 1984)
Ga. Code Ann. §§ 16-12-102 to 16-12-104
Ind. Code § 35-49-3-3 (Supp. 1986)
N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980)
N.C. Gen. Stat. §§ 14-190.13, .14 (Supp. 1985)
N.D. Cent. Code § 12.1-27.1-03.1 (Repl. Vol. 1985)
R.I. Gen. Laws § 11-31-10 (Supp. 1983)
Vt. Stat. Ann. Tit. 13, § 2804b (Supp. 1983)

Localities with display provisions include the cities of Minneapolis, Wichita and Philadelphia.